

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

COSTING TREATMENT OF
RETIREMENT DEBT REMOVAL

Docket No. RM2023-1

**RESPONSE OF THE UNITED STATES POSTAL SERVICE
IN OPPOSITION TO GCA PETITION FOR RECONSIDERATION
AND INITIATION OF PROCEEDING**
(November 10, 2022)

On November 4, 2022, the Greeting Card Association (GCA) submitted a petition requesting that the Commission: 1) reconsider positions taken in a letter from the Commission to the Postal Service dated October 7, 2022, and 2) initiate a rulemaking proceeding under 39 C.F.R. § 3050.11 to consider the matters discussed in that letter. The petition incorporated by reference procedural and substantive arguments presented in a letter submitted on October 13, 2022, by a consortium of mailer trade associations (including GCA) in response to the correspondence exchanged by the Postal Service and the Commission on August 12 and October 7, 2022, regarding the effects of passage of the PSRA on certain elements of ACR/CRA reporting. The Postal Service hereby provides its response in opposition to both aspects of the relief sought by GCA's petition – reconsideration of the approval expressed in the Commission's October 7 letter, and initiation of a new rulemaking docket.

Background

The Postal Service Reform Act (PSRA) was enacted on April 6, 2022, and had certain specific effects on the Postal Service's finances. On August 12, 2022, the Postal Service sent a letter informing the Commission as to how the Postal Service

expected to reflect some of these financial effects for regulatory purposes at the end of the year when, pursuant to section 3652 of title 39, it submits to the Commission the Annual Compliance Report (ACR) for FY 2022. That letter (hereinafter referred to as the Postal Service Letter) was submitted electronically, posted on the Commission's Daily Listings, and was just as available to interested parties as would have been any document submitted in a docketed proceeding. On October 7, 2022, the Commission responded to that correspondence in its own letter (also posted on the Daily Listings, and hereinafter referred to as the Commission Letter) that essentially approved the regulatory costing treatment described by the Postal Service letter given the highly unusual circumstances (although also seeking to ensure sufficient explanation of that treatment within the ACR documentation).

As noted above, a consortium of mailer trade associations submitted a letter on October 13 in response to the August 12 Postal Service Letter and October 7 Commission Letter, challenging the Commission's actions on both procedural and substantive grounds. This letter (hereinafter referred to as the Mailers Letter) sought the same functional relief as the instant petition – reversal of the Commission's approval of the treatment outlined in the Postal Service Letter in favor of alternative treatments identified by the mailers. The Mailers Letter also expressed the view that a formal notice and comment rulemaking docket would need to be initiated before any treatment they claim to be a departure from current practice could be endorsed. The instant GCA petition constitutes a second effort to commence a formal rulemaking docket to address these matters. Since GCA relies exclusively on the arguments articulated in the Mailers

Letter as the basis for the relief now sought, the instant opposition by the Postal Service of necessity correspondingly focuses on the arguments presented in the Mailers Letter.

Argument

The Mailers Letter first criticizes the procedural aspects of the current situation. The Mailers Letter asserts that the Commission “acknowledged” that the proposed treatment constitutes a change in accepted analytic principles. Mailers Letter at 2. Close reading of the Commission response letter indicates that the Commission never reached that conclusion. Instead, the Commission interpreted its section 3050.11 regulations as not applying to the instant circumstances. Commission Letter at 2, 4. Particularly telling in this regard is the absence of the identification in the Commission Letter of any particular analytic principle that the Postal Service’s proposed treatment would ostensibly “change.”

In past years following passage of the PAEA, consistent with generally accepted accounting principles (GAAP), the Postal Service accrued expenses in each year for that year’s scheduled prefunding payment for retiree health benefits. For regulatory purposes, it was entirely rational during those years to treat those accrued expenses each year like all other expenses for that year. This procedure allowed a fair representation of the totality of costs faced by the Postal Service in that year that needed either to be attributed to products or classified as institutional. Had the PAEA status quo continued in all respects, the Mailers Letter is correct that any departure in the treatment of those annual costs would have constituted a change in accepted analytical principles. Nonetheless, an analytical principle addressing the appropriate treatment of a steady series of *annual* prefunding costs does not establish the

appropriate procedure for the treatment of the sudden and unprecedented occurrence of a one-time reversal under GAAP of a decade's worth of unpaid prefunding expenses from prior years, which before the enactment of the PSRA appeared on the annual statement of operations as retiree health benefits in the year in which they were owed, and in subsequent years remained on the balance sheet as current liabilities – retiree health benefits. A new circumstance may require establishment of a new analytic principle, or merely the selection of a one-time resolution. Not surprisingly, and as confirmed by the observations on pages 2 and 4 of the Commission Letter regarding “unique and non-recurring accounting occurrences that are the result of statutory change,” there are no prescribed procedures in the Commission rules for establishing such new principles or resolutions, and the letters exchanged by the Postal Service and the Commission were perfectly adequate for such purposes. Commission Letter at 4 (stating that these procedures were proper in part because these circumstances are “not otherwise covered by Commission rules or precedent for changes in analytical principles”).

In this regard, the Mailers Letter is overlooking the fundamental distinction between legislative rulemaking (establishing or amending regulations with the force of law) and interpretative rulemaking (actions taken to interpret existing regulations, that do not have the force of law). See *Perez v Mortgage Bankers Assoc*, 575 US 92, 135 SCt 1199 (2015). The Commission Letter sets forth its interpretation of its current regulations: namely, that the Section 3055.11 procedures do not apply to these highly unusual circumstances that start and end in FY 2022, with no pretense of effects in future years. As such, it falls squarely within the parameters of interpretive rulemaking,

and the Mailers Letter contention that handling the matter in this fashion was *ultra vires* is baseless.

The Mailers Letter complaints about procedural deficiency ring particularly hollow in light of the acknowledgment (Mailers Letter at 7) that the Postal Service's letter explaining its planned approach was published on the Commission website. As a practical matter, this gave all interested parties ample opportunity either to directly identify and explain any substantive concerns, or to merely express a desire to be heard on the matter and request guidance on procedures to allow substantive input. For a period of nearly two months, mailers did neither. Belated suggestions now that the Commission should not have proceeded under these circumstances with an interpretation of its own regulations fall short, particularly given the further acknowledgment (Mailers Letter at 3) that these matters require resolution in advance of the Postal Service's (now ongoing) efforts to prepare the CRA and the ACR. Both the Postal Service and the Commission acted entirely reasonably in this matter, while the mailers, knowing the clock was ticking, simply failed to take advantage of available opportunities to offer their reaction to developments of which they were apparently fully aware, and which they now claim are potentially critical to their interests.

Substantively, despite claims to the contrary (Mailers Letter at 3-5), the omission of the negative \$57 billion entry associated with the reversal of past prefunding requirements from the FY 2022 CRA does not lack a reasonable basis. The Mailers Letter (at 5) discounts the Commission's assessments that including this entry would "create nonsensical results" and "potentially interfere with the regulatory purposes of the CRA." The Commission clearly reached these assessments in agreement with the

same conclusions reached by the Postal Service, and yet the Mailers Letter makes no attempt to address the specific regulatory interferences identified by the Postal Service. For example, the Mailers Letter offers no mechanism by which compliance with the statutory requirement that competitive products cover an appropriate minimum share of institutional costs can be evaluated if institutional costs are allowed to exogenously plummet to negative levels. Yet nothing contained within the PSRA would suggest any diminution in the legislative intent that such an appropriate share requirement be maintained. Similarly, the Mailers Letter makes no attempt to explain how an imputed income tax payment for competitive products can be derived if an appropriate share amount has not previously been calculated. More broadly, the notion that total institutional costs in a given year can be massively negative would indeed reflect a “nonsensical” result, and the Mailers Letter fails to articulate any basis to question that conclusion by advancing a purported explanation of how such a result could make sense.

Instead, the Mailers Letter (pages 5-6) focuses myopically on the hypothesized effects of negative institutional costs on the calculation of the density rate authority for this year. The Mailers Letter trumpets the possibility that, if the Postal Service cannot avoid inclusion of the negative \$57 billion entry in the CRA, “then its institutional costs for FY 2022 will be negative and its density authority will be zero.” Mailers Letter at 6. Obviously, such a potential scenario is lauded in the Mailers Letter, because it would allow the signatories to avoid the potentially higher rates associated with any material amount of density authority. Yet the Mailers Letter neglects to identify how this would lead to rational results, even when considering only the density authority. There is no

connection between cancellation of prior unpaid prefunding amounts and the purposes behind provision of density authority. Density authority is specifically intended to offset unavoidable increases in per-unit costs caused by the decline in mail density. The Commission explained the rationale for this additional rate authority as follows:

Put simply, when the Postal Service delivers fewer mailpieces to more delivery points, those costs which are driven by factors other than marginal changes in volume are spread over fewer pieces, necessarily increasing the per-unit cost. The loss of its economies of density means that the Postal Service's per-unit costs will be unavoidably higher than they were before the decline in density.

Order No. 5763, Docket No. RM2017-3 (Nov. 30, 2020) at 72. Operation of none of the elements identified by the Commission as the drivers of the need for the density authority were affected by passage of the PSRA. Mail volumes are still declining, and delivery points are still increasing (as the Mailers Letter implicitly acknowledges in the course of generating a current estimate of FY 2022 density authority). Under these circumstances, it would be the *preclusion* of density authority (caused by including the \$57 billion reversal) rather than the *allowance* of density authority (as a completely rational side effect of removing the \$57 billion reversal) that would constitute interference with and disruption of appropriate regulatory functions. Hence, the Mailers' results-oriented reasoning is irrational both when considering the broader regulatory purposes of the institutional costs calculation, as well as the narrower question as to the calculation of density authority.

The Mailers Letter also challenges the proposed treatment of so-called "normal costs." Mailers Letter at 6-7. Fundamentally, this argument is grounded not in an objection to the regulatory treatment proposed for the ACR/CRA, but rather to the underlying accounting treatment itself. The Mailers Letter claims:

Under established costing methodologies, based on the Postal Service's accrual accounting, these costs should be accrued – and have been for years – regardless of whether the Postal Service makes any payments to the Treasury to fund them.

Id. At 7. This is incorrect. When enacting the PAEA in 2006, Congress required that the Postal Service prefund its retiree health benefits, which in turn required the Postal Service to for the first time accrue those expenses under multi-employer accounting rules based on invoices from OPM. When enacting the PSRA this year, however, Congress reversed course and eliminated the obligation to make prefunding payments. In accordance with the provisions of the PSRA, there is no prefunding liability to be accrued in FY 2022 under the prevailing accounting principles, as there is no invoice from OPM, nor are there any other expenses this year relating to retiree health benefit funding. The critical issue at the moment is not, as the Mailers Letter would erroneously suggest, whether Postal Service employees may be theoretically earning such benefits, but rather whether Congress has imposed any obligation that any prefunding payments for such benefits be made to Treasury. The Mailers Letter (page 6) concedes that the PSRA repealed any obligation (that could serve as the basis for accrual) at least “until FY2025 (sic).” These circumstances preclude any possibility of attributing “normal costs” in excess of total accrued costs for retiree health benefits, which for FY 2022 (at the very least) are zero.

In conclusion, neither the Mailers Letter nor, by extension, the GCA petition, offers any meritorious basis for the Commission to rescind its letter of October 7. As the Commission has already correctly concluded, the treatment outlined in the Postal Service Letter is reasonable under the unique circumstances resulting this year from passage of the PSRA. In contrast, the alternatives preferred by the mailers would

indeed create “nonsensical” results. There is no valid basis for the Commission to reconsider the positions taken in the Commission Letter. Moreover, the Commission should likewise deny the request to initiate a section 3050.11 notice and comment proceeding. The Commission can interpret its existing regulations without the need for any such proceeding, and the parties have had ample opportunity to be heard. Moreover, as a practical matter, there simply is no time to conduct and conclude any such proceeding and still leave anything approaching sufficient time for the Postal Service to use the outcome to guide its preparation and submission of the ACR pursuant to the required statutory schedule.

Therefore, the Postal Service respectfully submits that all relief requested by the GCA petition should be denied.

Respectfully submitted,

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